IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. ____

JOAN ANNE KARRIGAN, BARRY BERK, and ALVIN GERSON LEVITT,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT,
OCTOBER TERM, 1974:

The petitioners JOAN ANNE KARRIGAN, BARRY BERK, and ALVIN GERSON LEVITT, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed March 10, 1975, and affirming the convictions of each of the petitioners for violation of Title 18, U.S.C. §1955. This single petition is jointly filed on behalf of each petitioner pursuant to Rules of the Supreme Court of the United States, Rule 46.

This case presents one of the clearest abuses of the wiretap statute. The Government here attempts to avoid the strict requirements of that statute with regard to prior investigative techniques by relying in this case upon a mere parroting of the language of the statute without any factual basis to justify a conclusion that other investigative techniques were tried, or were too dangerous. The case also presents issues regarding fundamental exercise of congressional power under the Commerce Clause. This issue arises primarily as a result of a unique factual stipulation entered into between the parties before the District Court.

OPINION BELOW

The memorandum and unreported opinion of the Court of Appeals appears in the Appendix hereto as Appendix "A." No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 10, 1975, affirming the petitioners' conviction for violation of Title 18, U.S.C. §1955. A copy of the judgment, in letter form, obtained from the office of the Clerk, United States Court of Appeals for the Ninth Circuit, appears in the Appendix as Appendix "B." A timely Petition for Rehearing and Suggestion for Rehearing en Banc was denied on April 22, 1975. A

copy of the order denying Petition for Rehearing and rejecting Suggestion for Rehearing en Banc appears in the Appendix as Appendix "C."

An application for order extending time to file Petition for Writ of Certiorari was granted on May 19, 1975 by the Honorable W.J. Brennan, Jr., extending such time to June 21, 1975. A copy of the Order dated May 19, 1975, appears in the Appendix as Appendix "D." The Court's jurisdiction is invoked pursuant to Title 28, U.S.C. §1254 (1) and Rule 22 (2).

QUESTIONS PRESENTED

1. Whether the requirements of Title 18, U.S.C. §§2518(1) (c) and (3) (c) with regard to the necessity for a wiretap applicant to include a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried" are satisfied through a mere boiler plate recitation of the difficulty of obtaining evidence in "bookmaking cases"?

2. Whether the application of Title 18, U.S.C. §1955 to these petitioners, in view of a stipulation of facts which, in part, stipulated that the instant case involved no interstate gambling or interstate travel in connection with gambling, no contact with organized crime, no connections with eastern or midwestern or out-of-state gamblers, and no evidence of corruption, breakdown, or bribery of local law enforcement, violates the intent and exceeds the power of Congress in enacting that section?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following relevant provisions appear in the Appendix as Appendix "E":

Title 18, U.S.C. §2518(1)(c).
Title 18, U.S.C. §2518(3)(c).
Title 18, U.S.C. §1955.
Amendment IX, United States Constitution.
Amendment X, United States Constitution.

STATEMENT OF THE CASE

Indictment 9615 was filed in the United States District Court for the Central District of California on or about February 2, 1972, charging petitioners ALVIN GERSON LEVITT and JOAN ANNE KARRIGAN, and five other defendants in one count with a violation of Title 18, U.S.C. §1955 alleged to have occurred from on or about May 13, 1971 to on or about July 16, 1971. On that same date, Indictment 9614 was filed in the United States District Court for the Central District of California charging the petitioner BARRY BERK and six other defendants in one count with a violation of Title 18, U.S.C. §1955 alleged to have occurred from on or about May 13, 1971 to on or about July 16, 1971. Motions to suppress evidence and to traverse and quash orders authorizing the interception of oral communications were made and denied.

Each of the petitioners waived trial by jury and the matter proceeded to court trial

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before the Honorable FRANCIS C. WHELAN, Judge Presiding. The matter proceeded factually upon a stipulation agreed to by and betwe en the government and each of the petitioners. A portion of the stipulation appears in the Appendix hereto as Appendix"F."

The District Court denied motions for judgment of acquittal as to each petitioner. The Court found petitioner BERK guilty as charged in the indictment. It was the order of the Court that petitioner pay a fine of $350.00; imposition of sentence as to imprisonment only was suspended and the petitioner was placed upon probation for a period of one year.

The Court found the petitioner LEVITT guilty as charged in the indictment. Imposition of sentence as ti imprisonment was suspended and the petitioner was placed upon probation for a period of three years. It was further ordered that petitioner LEVITT pay a fine of $2,500.00

The District Court thereafter found the petitioner KARRIGAN guilty as charged in the indictment. The Court ordered the petitioner to pay a fine in the amount of $50.00; imposition of sentence as to imprisonment only was suspended and the petitioner was placed upon probation for a period of six months.

A timely appeal was taken to the United States Court of Appeals for the Ninth Circuit, which Court, on March 10, 1975 entered its judgment affirming the conviction of each of

the petitioners. A timely Petition for Rehearing and Suggestion for Rehearing en Banc was denied on April 22, 1975.

The facts as presented by the stipulation demonstrate the following:

The Federal Bureau of Investigation intercepted wire communications on May 14, 1971 pursuant to Court authorization, and during the course of an investigation of petitioner LEVITT. The interception lasted for a period of two weeks and involved three separate telephones and locations. The interception was followed by succeeding authorizations to monitor three additional telephones from June 16, 1971 through June 28, 1971.

Transcripts of the intercepted communications were submitted to a Los Angeles Police Department gambling expert for analysis. He concluded that petitioner LEVITT was engaged in a bookmaking operation in Los Angeles between May and July, 1971, and that daily wagers accepted by the operation exceeded $2,000 per day on various occasions and that on June 27 and June 28, gross receipts exceeded $20,000.

Petitioner LEVITT managed the day-to-day operation of the business with two assistants, not involved in the present petition. A bettor telephoned the LEVITT operation through a number supplied by an agent, or would relay the bet through the agent. The agent would then either pay if the bettor won or collect if the bettor lost. Petitioner BERK was identified as an "agent."

The stipulated testimony of various customers, indicated that petitioner BERK and others sought out bettors, paid winners and collected from losers.

Bets accepted by the operation were relayed to a "back office" operated by one CHRISTOPHER ZAMBROS. ZAMBROS would periodically tally the bets and compute wins and losses. Petitioner KARRIGAN was among other individuals utilized as a "back office clerk." The information as to wins and losses was transmitted either directly to petitioner LEVITT or through an accountant to petitioner LEVITT.

REASONS FOR GRANTING A WRIT

I

BOILER PLATE RECITATIONS IN THE AFFIDAVITS IN SUPPORT OF THE VARIOUS APPLICATIONS FOR WIRETAP AUTHORIZATION ARE INSUFFICIENT TO MEET THE REQUIREMENTS OF 18 U.S.C. §2518 (1)(c) AND (3)(c) AND FAIL TO DEMONSTRATE THAT NORMAL INVESTIGATIVE PROCEDURES HAVE BEEN TRIED AND FAILED OR REASONABLY APPEAR TO BE UNLIKELY TO SUCCEED.

This Honorable Court has not given direct consideration to the sufficiency of applications alleging unlikely success of other investigative techniques. United States v. Chavez, ___ U.S. ___, 94 S.Ct. 1820, 1826-1827 (1974);

"Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced a clear intent to make doubly sure that the statutory authority be used with restraint and only where circumstances warrant the surreptitious. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state in the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. (Citation omitted) The Act plainly calls for the prior, informed judgment of enforcement officers desiring court approval for intercept authority, and investigative personnel may not themselves ask a judge for authority to wiretap or eavesdrop. The mature judgment of a particular, responsible Department of Justice official is interposed as a critical precondition to any prejudicial order." (Emphasis added.)

The requirements of Titla 18, U.S.C. §§ 2518(1)(c) and (3)(c) include a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous" (emphasis added).

The purpose of this language is to "assure that wiretapping is not resorted to in situations which additional investigative techniques would suffice to expose the crime." United States v. Kahn, ___ U.S. ___, 94 S.Ct. 977, 983 (1974), footnote 12. The allegations made in the affidavits in the present case are clearly insufficient to satisfy this substantial requirement and violate the clear intent of Congress in enacting the wiretap legislation with appropriate safeguards. 1/ The fundamental difficulty with regard to the allegations contained in the affidavits is that they do not maintain that normal investigative techniques would be insufficient in the present case, but only in this kind of case. The ability to rely upon such generalized allegations is clearly undercut by the provisions and legislative history of Title 18 U.S.C. §2516. That section details the particular criminal activity which may be the subject of investigation through wiretap. The legislative history of that section indicates that the difficulty of obtaining evidence in the kinds of cases listed there was one of the purposes for permitting court authorized wiretaps. Thus, the kind of case is a reason for allowing a wiretap in the first instance. Obviously, and as was recognized by Congress in the legislative history of §2516, an affiant could always state

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1/ Relevant portions of the affidavits in support of wiretap authorization appear in the Appendix hereto as Appendix "G."

that evidence is difficult to obtain in any of the kinds of cases listed in §2516. Clearly, the requirement of §2518(1)(c) must encompass more than mere reliance upon the kind of case and must, therefore, intend that the investigating officers detail specific facts with regard to the individuals under consideration. Otherwise, the "full and complete statement" language becomes meaningless in light of the legislative history of §2516, and the recognition given there to the difficulty of obtaining evidence in the kinds of cases listed.

This interpretation is completely consistent with the position taken by this Honorable Court in United States v. Giordano, supra, that wiretap is not to be used as the initial step in investigation, but only particularized facts and through particularized procedures. The situation involved here is akin to the issue presented by the knock and notice requirement of Title 18, U.S.C. §3109. In United States v. Likas, 448 F.2d 607 (7th Cir. 1971), the Court considered a situation in which federal agents, armed with a search warrant which sought, among other things, the seizure of "flash paper," determined that based upon their previous experience in attempting to seize such items, compliance with the knock and notice provisions was not required. The government urged that the possibility that "flash paper would be destroyed immediately following any announcement of purpose authorized the officers' unannounced intrusion." The Court noted "it is our opinion, however, that the government's position is incorrect . . ."

448 F.2d 607, 609. The Seventh Circuit went on to note:

> "The possible destruction of evidence in this situation is insufficient to condone the officers' actions, which are in clear derogation of the strictures of §3109. In Miller v. United States, 357 U.S. 301, 313, 78 S.Ct. 1190, . . . the Court stated:
>
> "'We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence upon observance by law enforcement officers of traditional fair procedural requirements is, far from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of the guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness.'"

United States v. Likas, supra, 448 F.2d at 609.

The recognition that wiretap, as the most potent weapon in the prosecutor's arsenal, should be used only in the most serious cases and only after initial investigatory steps have

failed or are too dangerous, mandates that this Court consider the issues left open in United States v. Kahn, supra, and United States v. Chavez, supra, with regard to the sufficiency of allegations of "other investigative techniques." The possibility of abuse of the system, the protection of the rights of the individual and the necessity for effective and unassailable law enforcement renders such a decision necessary.

II

THE APPLICATION OF TITLE 18, U.S.C. §1955 TO THESE PETITIONERS, IN VIEW OF A STIPULATION OF FACTS WHICH, IN PART, STIPULATED THAT THE INSTANT CASE INVOLVED NO INTERSTATE GAMBLING OR INTERSTATE TRAVEL IN CONNECTION WITH GAMBLING, NO CONTACT WITH ORGANIZED CRIME, NO CONNECTIONS WITH EASTERN OR MIDWESTERN OR OUT-OF-STATE GAMBLERS, AND NO EVIDENCE OF CORRUPTION, BREAKDOWN, OR BRIBERY OF LOCAL LAW ENFORCEMENT VIOLATES THE INTENT AND EXCEEDS THE POWER OF CONGRESS IN ENACTING THAT SECTION.

The unique nature of the factual situation of the present case arises as a result of a stipulation entered into between the parties.

That stipulation, in paragraph 36, states in part as follows:

> "That during the course of the telephone intercepts, they did not disclose any interstate gambling or any interstate travel in connection with gambling.
>
> "That the investigation herein did not disclose contact with any organized crime syndicates as that term is commonly understood, nor connections with Eastern or Midwestern or out-of-state gamblers.
>
> "That no evidence of corruption of local law enforcement was revealed, nor did there appear to be any breakdown in law enforcement or bribery of law enforcement officials."

It is submitted that this stipulation removes these petitioners from the proper ambit of application of Title 18 U.S.C. §1955. That section was enacted as Title VIII of the "Organized Crime Control Act of 1970," public law 91-452. Jurisdiction for the act was sought pursuant to Article I, Section VIII, Clause 3 of the United States Constitution which confers upon Congress the Power "to regulate commerce . . . among the several states." This jurisdiction was in turn based upon congressional findings which were in large measure directed toward establishing a sufficient factual basis between the prohibited conduct and a proper exercise of federal jurisdiction under the clause. The preamble of the act states in part:

> "It is the purpose of this act . . . to seek the eradication of organized crime in the United States by strengthening the legal tools and the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." (Emphasis added.)

The congressional statement of findings, included in Section I of public law 91-452 states in part:

> "The intent of the committee, as noted above, is not to bring all illegal gambling activity within the control of the federal government. Title 8 deals only with those who are engaged in an illicit gambling business of major proportions." Ibid, page 73.

After enunciating the codified definition of illegal gambling activity the report goes on to note that "it will reach only those who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be a matter of national concern." Ibid.

Congress has thus relied specifically upon the corrupting and debilitating effect of organized crime on interstate commerce to

justify the extension of federal jurisdiction into the area of illegal gambling. The congressional findings are relevant to a determination of legality and applicability of the statute under consideration in a variety of respects. First, the proper exercise of jurisdiction by Congress is directly dependent upon the existence of a rational basis for the legislative finding that the statutory scheme is necessary and proper to protect the avenues of interstate commerce. Katzenbach v. McClung, 379 U.S. 294, 85 S.Ct. 377 (1964).

Secondly, the exercise of congressional power is subject to review by the judiciary in order to determine whether a sufficient factual basis does exist for the congressional finding of a rational basis and to determine whether there is an adequate and explicit basis for such findings. Katzenbach v. McClung, supra; Perez v. United States, 402 U.S. 146, 91 S.Ct. 1357 (1971).

Perhaps most important with regard to the present case is the requirement that congressional exercise of jurisdiction does not conflict with the notion of federalism or with the reservation of power contained in the Ninth and Tenth Amendments to the United States Constitution. These considerations are particularly relevant in a criminal statutory scheme where it has been consistently recognized that the state has a significant interest in exercising its own police powers over criminal activity which occurs within its borders. Thus, "unless congress conveys its purpose

clearly, it will not be deemed to have significantly changed the federal state balance." United States v. Bass, 404 U.S. 336, 349, 92 S.Ct. 515, 523 (1971). See also Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056 (1971); Federal Trade Commission v. Bunte Brothers, 3'2 U.S. 349, 61 S.Ct. 580 (1941).

In substance therefore, the stipulation cited above established that there were no interstate aspects in the appellants' gambling activity and that none of these basis specifically relied upon for the exercise of congressional power existed in the present case. While it is true that the stipulation was drawn in terms of absence of discovery of such indicia of interstate or corrupting aspects, it is apparent that the petitioners in this case have proved the lack of interstate or debilitating activity as well as could be possible in any case. To require more would require that petitioners prove a negative. This Court has indicated in a variety of circumstances, and perhpas most recently in the obscenity area that the burden or proving a negative is "virtually impossible to discharge." Hamling v. United States, ___ U.S. ___, 94 S.Ct. 2887 at 2907 (1974); Miller v. California, 413 U.S. 15, 22, 93 S.Ct. 2607, 2613 (1973). In Hamling and Miller the Court determined that the burden upon the prosecution of proving material "utterly without redeeming social importance" was so difficult as to justify the removal of that burden. Similarly here, petitioners cannot be requested to prove that no such aspects existed, but only to demonstrate, as was done through the stipulation, that there was not one bit of evidence

produced to substantiate the existence of any of these factors.

Consequently, there have been no congressional findings which are applicable to the determination that the activity of thepetitioners in the present case in any way affected interstate commerce. The only possible theory upon which federal jurisdiction could be extended to this activity is pursuant to the "cumulative effect"doctrine. Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82 (1942). In the Wickard case, this Court considered federal legislation which in part imposed a penalty for maintaining an available wheat crop in excess of marketing quotas. The appellee there urged that the wheat he maintained was for his own personal consumption, a purely local matter and thus outside the scope of congressional power. This Court determined that congress was impowered to initiate regulation of the wheat market based upon a finding of national importance in the security of that market. The Court noted:

> "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where as here, his contribution, taken together with that of many others similarly situated, is far from trivial." 317 U.S. at 127-128, 63 S.Ct. at 90 (Emphasis added).

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This Court thus determined that based upon the congressional findings there was a rational basis for the legislature to conclude that the activity of the small wheat farmer maintaining wheat for his personal use affected interstate commerce. Thus, the exercise of federaljurisdiction was appropriate. However, it is necessary to realize that the extension of that jurisdiction was dependent upon the ability of congress to conclude that there was an effect upon interstate commerce. See also National Labor Relations Board v. Reliance Fuel Oil Corp., 371 U.S. 224, 83 S.Ct. 312 (1963).

In the present case, however, the finding of effect upon interstate commerce was based upon the considerations enumerated in the legislative history but which were stipulated not to exist in the present case. This is therefore not a situation where a cumulation of persons situated similarly to the petitioners would result in an effect upon interstate commerce. Congress made no findings with regard to activities which do not have the indicia of effect on interstate commerce through the enumerated criteria. Thus, there is no basis for extending federal jurisdiction to the activity of petitioners.

Moreover, it is interesting to note that even in those cases where the cumulative effect doctrine is properly applied, the Court has permitted consideration of the size of the subject activity as bearing on whether congress intended to reach such activity. Wickard v. Filburn, supra, Federal Trade Commission v. Bunte Brothers, supra. In the present case, congress' intent

was clearly to permit federal prosecution of activity conducted by "organized crime." It is stipulated, however, that the activity under consideration here is in no way associated with "organized crime." Thus, it would subvert the attempt of congress to apply the federal criminal prohibition to these petitioners. Such an interpretation would also conflict with the reserved powers of the Tenth Amendment. For, "congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the states." United States v. Bass, supra, 404 U.S. 349, 92 S.Ct. at 523. The conduct under consideration here is outlawed by state law. The concern which the legislature expressed with regard to the inability of the states to prosecute organized crime because of the corrupting influence of that element does not exist here. Thus, the true repository of power to prosecute this activity should reside with the state. The extension of federal power thus violates the Tenth Amendment. As was stated in Bass, at 404 U.S. 350, 92 S.Ct. 523-524:

> "In the instant case, the broad construction urged by the government renders traditional local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources. Absent proof of some interstate commerce nexis in each case, §1202(a) dramatically intrudes upon traditional state criminal jurisdiction."

This Court went on to discuss the case of Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056 (1971), where, as in Bass, the Court determined that "the legislative history provides scanty basis for concluding that congress faced those serious questions and meant to effect the federal-state balance in the way now claimed by the government." Bass v. United States, supra. In the present case, the clear intent expressed by congress was to not reach the conduct here under consideration. Thus, there is an even stronger case for assuming that federal jurisdiction does not extend to this activity.

A further reason for the inapplicability of the cumulative effect doctrine is discussed in Perez v. United States, 402 U.S. 146, 91 S.Ct. 1357 (1971). In that case, this Court considered the constitutionality of 18 U.S.C. §891 which dealt with extortionate credit transactions. The legislative history there specifically determined that purely local extortionate credit transactions affected interstate commerce as a result of the threat of violence and injury utilized to enforce the "loan sharking" debts. Noting that even with such a legislative finding the "constitutional question is a substantial one" (402 U.S. at 149, 91 S.Ct. at 1359) the Court discussed the "class of activities test" which was a formulation of the cumulative effect doctrine. Basically, that test held that when a "class of activities was held properly regulated by congress" it was unnecessary to prove that the particular intrastate actavity in question had an effect upon commerce. In effect, that test merely restates the cumulative effect doctrine since the Court in Perez v. United States, at 402 U.S. 153,

91 S.Ct. 1361, noted that the class of activities test was limited by the Courts to those situations in which the activity affected commerce per se. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348. The Court determined that credit transactions per se affected commerce, since the cumulative effect obviously would. Thus the historical distinction between "activities in commerce" and local activity is no longer significant except to the extent that intrastate, or local, activities may meet the test if appropriate findings are made as to the effect upon interstate commerce.

Thus, if a class of activity is totally within the federal power, an individual cannot complain about a de minimus effect. If it is determined that congress has power over the particular class of activity it must be determined, with particular reference to the legislative findings upon which the jurisdiction is based whether the activity in question falls within the "class." It is submitted that the appropriate "class" under consideration pursuant to §1955 is that class of activities which involves organized crime. Again, the stipulation removes any possibility that the activity in question here falls within this particular class. Thus, this case is outside the cumulative effect or class of activities doctrines. Inasmuch as congress has made no findings with regard to the activity here in question, there is no basis for federal jurisdiction and the application of §1955 to these petitioners is unconstitutional.

Thus, cases such as United States v. Sacco, 491 F.2d 995 (9th Cir. 1974) relied upon by the

court below at footnote 1, paragraph 1 are inapplicable herein. The Ninth Circuit in Sacco, in following the correct rule noted that:

> "Legislative history reveals that congress had a rational basis for finding that illegal gambling proscribed by §1955 affected interstate commerce. Congress determined that organized crime posed a major threat to American society and that illegal gambling operations provided organized crime with its greatest source of revenue." (Emphasis added.)

The opinion of the court below, in misstating and misapplying this rule, has completely warped the class of activities and cumulative effect doctrines. This Court should therefore take this opportunity to explain and clarify these important issues, which clearly have substantial impact upon congressional authority in numerous criminal and noncriminal areas. Furthermore, if §1955 is applied to the activity involved in the present case, it would appear that there is a substantial question whether a rational basis exists for congress' conclusions that the standards announced in §1955 reflect the intent of congress with regard to organized crime activity. For, if none of the interstate commerce difficulties which were sought to be alleviated through enactment of §1955 exist in the present case, the applicability of that section to petitioners would render the presumption irrational. Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241. In either case, a reversal is mandated.

CONCLUSION

This petition presents fundamental issues regarding the necessity for federal agents to pursue reasonable avenues of investigation prior to utilizing the awesome interference of wiretapping. The petition also raises very basic and fundamental issues concerning congressional power under the commerce clause and questions the opinion below which purports to authorize a previously unclaimed authority for the exercise of federal jurisdiction. It is thus respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOAN ANNE KERRIGAN, *Defendant-Appellant.*	No. 74-2696
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ALVIN GERSON LEVITT, *Defendant-Appellant.*	No. 74-2692
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. BARRY BERK, *Defendant-Appellant.*	No. 74-2695
	MEMORANDUM

[March 10, 1975]

Appeal from the United States District Court
for the Central District of California

Before: KOELSCH and GOODWIN, Circuit Judges,
and RENFREW,* District Judge

Appellants Kerrigan, Levitt and Berk appeal from their convictions in the Central District of California for conducting an illegal gambling business in violation of 18 U.S.C. §1955. The case was

*The Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.

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submitted to the court upon a stipulation of facts. We affirm the judgments below.

Appellants raise seven issues on appeal, of which only one has merit.[1] 18 U.S.C. §2518(1)(c) requires a wiretap applicant to

[1]A discussion of the other six issues follows:

1. Appellants contend that §1955 cannot constitutionally be applied to them, because the government stipulated that investigation had disclosed no contacts with organized crime, interstate gamblers or police corruption. Our decision in *United States v. Sacco*, 491 F.2d 995 (9th Cir. 1974), disposed of this contention. "If the class of activities is within the reach of the federal power and the regulation imposed is reasonable, a court's investigation is concluded. There is no need for inquiring on a case-by-case basis or proof that a particular activity had an effect on commerce. [citations omitted]" 491 F.2d at 999. This holding that §1955 is a valid exercise of Congressional power under the Interstate Commerce Clause disposes of appellants' Tenth Amendment objections that the statute impermissibly invades the reserved powers of the states.

2. Appellants claim that the classification of §1955 violations as felonies violates equal protection since the very same conduct might only result in a misdemeanor conviction in state court. (See Cal.Penal Code §337(a).) Congress' power to proscribe conduct carries with it the power to impose appropriate penalties without attempting to match them to varying state punishments for similar conduct. Hence, the potentially different treatment of §1955 violators as compared to California Penal Code §337(a) violators raises no cognizable equal protection infringement nor does it invade any power reserved under the Tenth Amendment to the state to prosecute violations of penal laws within its borders.

3. Appellant Kerrigan's assertion that her prior state conviction was for the exact same conduct as the federal indictment is not clear from the stipulated facts. Her further contention that the double jeopardy clause makes it a bar to the federal prosecution is completely contrary to law. *Abbate v. United States*, 359 U.S. 187, 195 (1959); see *Bartkus v. Illinois*, 359 U.S. 121, 136-158 (1959).

4. Appellant Berk asserts that the evidence was insufficient to prove that he "conducted" an illegal gambling business. The evidence of his activity in settling bets and in disseminating a phone number and code name for placing bets was substantial; thus, the lower court properly concluded that the test of *Sacco, supra*, 491 F.2d at 1002-1003, had been met.

5. Appellants' convictions were based in large part on evidence gained through two court ordered wiretaps. Appellants' claim of privilege for the wiretapped conversations is based upon a wholly unsupportable construction of both California Penal Code §631 and 18 U.S.C. §2517(4). We find no basis for believing that California attempted to prohibit the use of federally authorized wiretaps in federal prosecutions, or that Congress

include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried * * *." 18 U.S.C. §2518(3)(c) further requires the court to find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried * * *." Appellants contend that the government showing was deficient on this point.[2]

An affidavit by Special Agent Larry Montague was filed in support of the wiretap application. It summarized the evidence produced by the following investigative techniques: physical surveillance of the suspects, inspection of phone company records and police records, a previous wiretap, and the use of informants. Special Agent Montague declared that all informants had stated they would refuse to testify even if granted immunity and he determined that the remaining evidence would not suffice to support a conviction. The affidavit concludes with Montague's reasons for believing that other investigative procedures would be unlikely to produce usable evidence, specifically the general unwillingness of bookmaking customers to testify and the proclivity of bookmakers to keep unintelligible records, if any, and to destroy them in case of search.

We agree with appellants that the boilerplate recitation of the difficulties of gathering usable evidence in bookmaking prosecutions is not a sufficient basis for granting a wiretap order. To hold

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intended to sanction such a prohibition by the preservation of privilege set forth at §2517(4).

6. Appellants claim that the United States Attorneys making the wiretap applications failed to use independent judgment in determining the need for the interceptions, as required by *United States v. Giordano*, 416 U.S. 505, 515 (1974). The application disclosed that the United States Attorneys fulfilled their obligations by engaging in extensive discussions with special FBI agents assigned to the case as well as officials of the Organized Crime and Racketeering Section, Criminal Division, Department of Justice, prior to making the wiretap application.

[2]The issue of whether the Attorney General's automatic signature upon recommendation of a Deputy Assistant Attorney General constitutes compliance with the further requisites of *Giordano* was alluded to in appellants' reply brief. However, since it was neither raised in appellants' initial brief nor urged at oral argument, we do not consider it one of the issues presented on appeal.

otherwise would make §2518(1)(c) and (3)(c) mere formalities in bookmaking cases. However, in this case, agents had engaged in investigation for over three months, including physical surveillance of the suspects, had reasonably established that their informants would not testify, and had reason to believe that the other evidence thus far produced would not support a conviction. Further, physical surveillance of the residence identified by informants as housing the four "front office" telephones disclosed that it was fronted by a 5-foot high chain link fence topped by 3-stranded barb wire and had two large dogs patrolling the area between house and fence. Thus the government demonstrated a factual basis for its concern that the suspects might have time and inclination to destroy evidence in case of search.

While this Court gives little weight to conclusionary statements about the likely outcome of future investigations, we also recognize that the law does not require that a wiretap be used only as a last resort. On balance we find that the affidavit submitted in this case, while marginal, does suffice to meet the requirements of §2518(1)(c).

For the foregoing reasons, the judgments are affirmed.

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APPENDIX B

Office of the Clerk

United States Court of Appeals for the Ninth Circuit

U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

MAR 10 1975

74-2692) USA vs. Levitt
74-2695) USA Vs. Dark
74-2696) USA vs. Kerrigan

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered_____

MAR 10 1975 Affirming

---

the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

RECEIVED
MAR 11 1975
Nasatir, Sherman & Hirsch

Very truly yours,

[redacted] Clerk
U.S. Court of Appeals

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APPENDIX C
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ALVIN GERSON LEVITT, Defendant-Appellant.	)	No. 74-2692
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. BARRY BERK, Defendant-Appellant.	)	No. 74-2695
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOAN ANNE KERRIGAN, Defendant-Appellant.	)	No. 74-2696

Before: KOELSCH and GOODWIN, Circuit Judges, and RENFREW,* District Judge.

*The Honorable Charles B. Renfrew, United States District Judge for the Northern District of California, sitting by designation.

ORDER DENYING
PETITION FOR REHEARING
AND REJECTING SUGGESTION FOR
REHEARING IN BANC

The panel, as constituted in the above case, voted to deny the petition for a panel rehearing. Judges Koelsch and Goodwin voted against a rehearing in banc, and Judge Renfrew recommended that a rehearing in banc be rejected.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. F. R. App. P. 35 (b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

APPENDIX D

Supreme Court of the United States

No. A-950

JOAN ANNE KARRIGAN, ET AL.,

Petitioners

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s), IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 21, 1975.

/S/ William J. Brennan, Jr.

Associate Justice of the Supreme Court of the United States

Dated this 19th

day of May, 1975.

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APPENDIX E

TITLE 18 U.S.C.

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L. 91-452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

* * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

UNITED STATES CONSTITUTION,
AMENDMENT IX STATES:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

UNITED STATES CONSTITUTION,
AMENDMENT X STATES:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

APPENDIX F

A portion of the stipulation entered into between the parties before the United States District Court for the Central District of California states:

> "That during the course of the telephone intercept, they did not disclose any interstate gambling or any interstate travel in connection with gambling.
>
> "That the investigation herein did not disclose contact with any organized crime syndicates as that term is commonly understood, nor connections with Eastern or Mid-western or out-of-state gamblers.
>
> "That no evidence of corruption of local law enforcement was revealed, nor did there appear to be any breakdown in law enforcement or bribery of law enforcement officials."

APPENDIX G

RELEVANT PORTIONS OF WIRETAP AFFIDAVITS AND APPLICATIONS

Application in support of No. 2771?

"Alfred N. King, an attorney of the Organized Crime and Racketeering Section, United States Department of Justice, being first duly sworn, states:

". . .

"4(c) Normal investigative procedures have been tried with limited success and reasonably appear to be unlikely to succeed in securing prosecutable evidence."

Affidavit in support of No. 2771 states in part:

"Larry G. Montague, Special Agent, Federal Bureau of Investigation, Los Angeles, California, being duly sworn, states:

". . .

"3(c) Normal investigative procedures reasonably appear to be unlikely to succeed.

". . .

"33. My experience and the experience of other Agents has shown that even though gambling 'customers' are identified, they are often unwilling to furnish information to law enforcement agents or officials inquiring into

gambling activities. This is even more true when the 'customer' or 'bettor' is a professional gambler himself and is requested to give information concerning a gambling operation. Experience has further established that even though telephone toll records are available which indicate a person is engaged in illicit gambling, the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would only succeed to a limited degree in establishing that (the suspects) are involved in gambling activities over the telephones subscribed to . . . Furthermore, such investigative techniques as physical surveillance and examination of the records obtainable on (the suspects) contain little probability of success in securing presentable evidence. Based upon my knowledge and experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted investigations of gambling activities, normal investigative procedures reasonably appear to be unlikely to succeed in establishing that the above individuals are involved in gambling activities over the aforementioned telephones in

violation of federal laws. My experience and the experience of other agents has shown that gambling raids and searches of gamblers and gambling establishments have not, in the past, resulted in the gathering of physical or other evidence to prove all elements of the offenses. I have found through my experience and the experience of other Special Agents who have worked on gambling cases, that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers, imm immediately prior to or during a physical search, sometimes destroy these records. Additionally, the records that have been seized in past gambling cases have generally not been sufficient to establish the interstate elements of federal offenses because such records are difficult to interpret, and many times are of little or no significance without further knowledge of the gamblers' activities and interstate nature. Therefore, the interception of these telephone communications is the only available method of investigation which has a resonable (sic) likelihood of securing the evidence necessary to prove violations of these statutes."

Application for Extension No. Misc. 2771 states in part"

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"Allan B. Streller, an attorney of the organized Crime and Racketeering Section, United States Department of Justice, being first duly sworn, states:

" . . .

"4 . . . (c) Normal investigative procedures have been tried with limited success and reasonably appear to be unlikely to succeed in securing prosecutable evidence."

Affidavit in support of No. Misc. 2771 states in part?

"Larry G. Montague, Special Agent, Federal Bureau of Investigation, Los Angeles, California, being duly sworn, states:

" . . .

" 3 . . . (c) Normal investigative procedures reasonably appear unlikely to succeed.

" . . .

"11. My experience and the experience of other agents has shown that even though gambling 'customers' are identified, they are often unwilling to furnish information to law enforcement agents or officials inquiring into gambling activities. This is even more true when the 'customer' or 'bettor' is a professional gambler himself and is requested to give information concerning a gambling operation. Experience has further established that even though telephone

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toll records are available which indicate a person is engaged in illicit gambling, the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would only succeed to a limited degree in establishing that (the suspects) are involved in gambling activities over the telephone subscribed . . . . Furthermore, such investigative techniques as physical surveillance and examination of the records obtainable on (the suspects) contain little probability of success in securing presentable evidence. Based upon my knowledge and experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted investigations of gambling activities, normal investigative procedures reasonably appear to be unlikely to succeed in establishing that the above individuals are involved in gambling activities over the aforementioned telephone in violation of federal laws. My experience and the experience of other agents has shown that gambling raids and searches of gamblers and gambling establishments have not, in the past, resulted in the gathering of physical or other evidence to be prove all the elements of the

offenses. I have found through my experience and the experience of other Special Agents, who have worked on gambling cases, that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers, immediately prior to or during a physical search, sometimes destroy these records. Therefore, the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove violations of these statutes."

Application in support of No. Misc. 2823 states in part:

"Allan B. Streller, an attorney of the Organized Crime and Racketeering Section, United States Department of Justice, being first duly sworn, states:

". . .

"4 . . . (c) Normal investigative procedures have been tried with limited success and reasonably appear to be unlikely to succeed in securing prosecutable evidence."

Affidavit in support of No. Misc. 2823 states in part:

"Larry G. Montague, Special Agent, Federal Bureau of Investigation, Los Angeles, California, being duly sworn, states:

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". . .

"3 . . . (c) Normal investigative procedures reasonably appear unlikely to succeed.

". . .

"20. My experience and the experience of other agents has shown that even though gambling 'customers' are identified, they are often unwilling to furnish information to law enforcement agents or officials inquiring into gambling activities. This is even more true when the 'customer' or 'bettor' is a professional gambler himself and is requested to give information concerning a gambling operation. Experience has further established that even though toll records are available which indicate a person is engaged in illicit gambling, the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would only succeed to a limited degree in establishing that (the suspects) are involved in gambling activities over the telephone subscribed to . . . Furthermore, such investigative techniques as physical surveillance, an examination of the records obtainable on (the suspects) contain little probability of success in securing presentable evidence. Based upon

my knowledge and experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted investigations of gambling activities, normal investigative procedures reasonably appear to be unlikely to succeed in establishing that the above individuals are involved in gambling activities over the aforementioned telephones in violation of federal laws. My experience and the experience of other agents has shown that gambling raids and searches of gamblers and gambling establishments have not, in the past, resulted in the offenses. (Sic) I have found through my experiences and the experience of other Special Agents, who have worked on gambling cases, that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers, immediately prior to or during a physical search, sometimes destroy these records. Additionally, records that have been seized in past gambling cases have generally not been sufficient to establish the elements of federal offenses because such records are difficult to interpret, and many times are of little or no significance without further knowledge of the gamblers activities. Therefore, the interception of these telephone communications

is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove violations of the statutes."

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1629

JOAN ANNE KARRIGAN, BARRY BERK AND ALVIN GERSON LEVITT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 514 F. 2d 35.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on March 10, 1975. A petition for rehearing was denied on April 22, 1975 (Pet. App. C). On May 19, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to June 21, 1975 (Pet. App. D), and the petition was

filed on June 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' conduct of a gambling business violated 18 U.S.C. 1955.

2. Whether the affidavits in support of the application for authorization of the wire interceptions in this case adequately demonstrated the inadequacy of other investigative procedures.

STATEMENT

Following a jury-waived trial in the United States District Court for the Central District of California, petitioners were convicted of conducting an illegal gambling business in violation of 18 U.S.C. 1955.[1] Petitioner Karrigan was sentenced to six months' probation and was fined $50; petitioner Berk was placed on one year's probation and was fined $350; petitioner Levitt received three years' probation and was fined $2,500 (Pet. 4–5). The court of appeals affirmed (Pet. App. A).

The essential facts are not in dispute. During May and June of 1971, the Federal Bureau of Investigation, pursuant to court authorization, monitored wire communications at three different locations during the course of an investigation into illegal gambling activities of petitioner Levitt and others. Transcripts of these interceptions and documentary evidence seized

[1] There was an extensive stipulation of facts, a copy of which we are lodging with the Clerk.

during a search conducted pursuant to a warrant showed that petitioner Levitt was engaged in a large-scale gambling operation, which brought in gross receipts in excess of $2,000 daily and on at least two days in excess of $20,000 (Pet. 6).

Customers placed their wagers with the Levitt operation through agents who relayed the bet to the appropriate person within the organization or provided the customer with a telephone number so that he could call in his wager directly. Petitioner Berk was such an agent and, as such, also solicited customers and settled accounts, collecting from losing bettors and paying winners. Once a wager was accepted by the operation, it was relayed to the "back office," where petitioner Karrigan was employed. As the outcome of the various sporting events became available, wins and losses were computed and reported either directly to petitioner Levitt or to him through an accountant (Pet. 6–7).

ARGUMENT

1. Petitioners contend that the facts as stipulated removed their gambling activity from the proper application of 18 U.S.C. 1955. They do not challenge the holding of the court of appeals (Pet. App. A, p. 1) that they were engaged in an "illegal gambling business," as defined by 18 U.S.C. 1955(b)(1). They clearly fit the definitions of the Act. They argue, however, that the stipulation established the purely *local* nature of their operation (Pet. 12–16), and consequently its exemption from any general congressional findings that illegal gambling businesses affect interstate commerce. This claim is without merit.

Contrary to petitioners' contention, the stipulation does not state as a fact that petitioners' activities do not affect interstate commerce but merely states that the telephone interceptions and the other investigative procedures had failed to disclose interstate gambling, interstate travel in connection with gambling, contact with organized crime, or corruption of local law enforcement officials.[2] However, the government was not required under 18 U.S.C. 1955 to show that petitioners' particular illicit gambling activities involved interstate commerce, *United States* v. *Meese,* 479 F. 2d 41, 42–43 (C.A. 8); *Schneider* v. *United States,* 459 F. 2d 540, 541 (C.A. 8), certiorari denied, 409 U.S. 877. And the statute itself is clearly constitutionally sound.

In enacting the Organized Crime Control Act of 1970, 84 Stat. 922, of which 18 U.S.C. 1955 was a part, Congress determined that gambling operations of the size encompassed by 18 U.S.C. 1955 have a substantial impact upon interstate commerce. See 84 Stat. 922–923. The courts have uniformly upheld this exercise of congressional power under the Commerce Clause. *E.g., United States* v. *Sacco,* 491 F. 2d 995 (C.A. 9); *United States* v. *Smaldone,* 485 F. 2d 1333 (C.A. 10), certiorari denied, 416 U.S. 936; *United States* v. *Hunter,* 478 F. 2d 1019 (C.A. 7), certiorari denied, 414 U.S. 857; *United States* v. *Palmer,* 465 F. 2d 697 (C.A. 6), certiorari denied, 409 U.S. 874; *United States* v. *Riehl,* 460 F. 2d 454 (C.A. 3); *United States*

[2] The small portion of the extensive stipulation relied upon by petitioners is reproduced at Pet. 13. For the context of the quoted section see p. 19 of the stipulation.

v. *Harris,* 460 F. 2d 1041 (C.A. 5), certiorari denied, 409 U.S. 877; *Schneider* v. *United States, supra.*

As the class of activities properly has been regulated by Congress, it is not necessary, to uphold application of the statute, to prove that individual activities within the class, such as petitioners' conduct of an illegal gambling business, had an effect upon commerce. *Schneider* v. *United States, supra,* 459 F. 2d at 541. See also *Perez* v. *United States,* 402 U.S. 146, 152–154. Nor can courts "excise, as trivial, individual instances" of the prohibited class of activities. *Maryland* v. *Wirtz,* 392 U.S. 183, 193.

There is likewise no merit to petitioners' contention that the statute should not apply to them because the gambling activities that Congress intended to regulate were exclusively those under the auspices of organized crime (Pet. 18–21). Although Congress, in enacting 18 U.S.C. 1955, was deeply concerned with the impact of illegal gambling activities conducted by organized crime, that was not its only concern, and the language of the Act clearly prohibits large-scale illegal gambling operations such as petitioners', without reference to a demonstrated relationship with organized crime.

2. 18 U.S.C. 2518(1)(c) requires that each application for an order authorizing the interception of wire or oral communications shall include, *inter alia*—

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous * * *

Similarly, a finding by the issuing judge that alternative investigative procedures are inadequate is a prerequisite for the issuance of an order authorizing electronic surveillance. 18 U.S.C. 2518(3)(c). Petitioner contends that the affidavits in support of the applications for authorization to conduct wire interceptions in this case were inadequate to meet the requirements of 18 U.S.C. 2518(1)(c).[3]

Sections 2518(1)(c) and 2518(3)(c) were part of the safeguards included in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510–2520, to ensure that the statutory authority to conduct electronic surveillance embodied therein would "be used with restraint and only where the circumstances warrant" such an investigative device. *United States* v. *Giordano*, 416 U.S. 505, 515. In short, electronic surveillance was "not to be routinely employed as the initial step in criminal investigation" (*ibid.*). On the other hand, the provisions of 18 U.S.C. 2518(1)(c) were obviously not intended to frustrate the use of wire interception as a valid investigative tool by requiring an unreasonably stringent showing of need:

[3] There were three separate applications and orders authorizing electronic surveillance involved here. An order was entered on May 13, 1971, authorizing the interception of conversations of certain conspirators over seven different telephones at various premises in Los Angeles, California (C.R. 251–255). On June 8, 1971, an extension order was entered authorizing continued interceptions over three of those telephones (C.R. 246–250). Finally, an order entered on June 15, 1971, authorized electronic surveillance on three different telephones located in Los Angeles and North Hollywood, California (C.R. 191–194).

> Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. [Citations omitted.] What the provision envisions is that the showing be tested in a practical and commonsense fashion.

S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968).

The requirement of Section 2518(1)(c) "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153, n. 12. "Congress * * * did not attempt to require 'specific' or 'all possible' investigative techniques before orders for wire taps could be issued. * * * '[T]he law does not require the government to use a wiretap only as a last resort.'" *United States* v. *Smith*, C.A. 9, Nos. 74–2936 and 74–2937, decided July 2, 1975.

Numerous decisions have stated various tests to be employed in evaluating the nature of the showing required by 18 U.S.C. 2518(1)(c).[4] These decisions teach, in sum, that the requirement of Section 2518 (1)(c) is satisfied when—viewing the affidavit in a practical and commonsense fashion—a sufficient fac-

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[4] See generally, *United States* v. *Armocida*, 515 F. 2d 29, 38 (C.A. 3), pending on petition for a writ of certiorari, Nos. 74–6683, 74–6686; *In re Dunn*, 507 F. 2d 195, 197 (C.A. 1); *United States* v. *Robertson*, 504 F. 2d 289 (C.A. 5), certiorari denied, No. 74–974, April 14, 1975; *United States* v. *Brick*, 502 F. 2d 219, 224 (C.A. 8); *United States* v. *James*, 494 F. 2d 1007 (C.A. D.C.), certiorari denied *sub nom. Jackson* v. *United States*, 419 U.S. 1020; *United States* v. *Pacheco*, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, No. 73–1510, April 14, 1975; *United States* v. *Curreri*, 388 F. Supp. 607, 618–622 (D. Md.), and cases cited therein.

tual basis is shown from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the criminal activities under investigation, or is necessary to ascertain the full scope of such criminal activities and the identity of the participants therein. See *United States* v. *Turner,* C.A. 9, No. 73–2740, decided July 24, 1975, slip op. 7–8. In making this determination, the issuing judge must consider the type of illegal activity under investigation and the extent to which telephonic communications are involved therein (*United States* v. *Bobo,* 477 F. 2d 974 (C.A. 4)). He should also weigh the opinions and conclusions of experienced investigators in determining whether to authorize the wire interception (*In re Dunn, supra,* 507 F. 2d at 197). Accordingly, considerable discretion rests with the issuing judge in determining whether the interception is necessary (*United States* v. *Smith, supra,* slip op. at 2),[5] and his determination should be accorded considerable weight by the reviewing court (*Jones* v. *United States,* 362 U.S. 257, 270–271). The affidavits here satisfied the showing required by Section 2518(1)(c) as consistently interpreted heretofore.[6]

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[5] In this connection, the issuing judge is, of course, free to request additional information regarding the feasibility of alternative investigative techniques if he is not satisfied with the showing made in the application.

[6] Petitioners' reliance (Pet. 10–11) upon *United States* v. *Likus,* 448 F. 2d 607 (C.A. 7), which held that federal agents could not dispense with the statutory requirements of 18 U.S.C. 3109 because of the possible destruction of evidence, is misplaced. Here, the pos-

Although an identical paragraph was included in each of the three affidavits submitted to show the need for electronic surveillance in the investigation of petitioners' gambling business (C.R. 167–189, 225–227, 243–244), the statements contained therein, in addition to being based on the affiant's knowledge and experience in similar gambling investigations, were based on rational inferences to be drawn from the facts in this particular case. As the court below noted (Pet. App. A, p. 3):

> [Each affidavit] summarized the evidence produced by the following investigative techniques: physical surveillance of the suspects, inspection of phone company records and police records, a previous wiretap, and the use of informants. [The affiant] declared that all informants had stated they would refuse to testify even if granted immunity and he determined that the remaining evidence would not suffice to support a conviction. The affidavit concludes with [the affiant's] reasons for believing that other investigative procedures would be unlikely to produce usable evidence, specifically the general unwillingness of bookmaking customers to testify and the proclivity of bookmakers to keep unintelligible records, if any, and to destroy them in case of search.

Viewing the affidavits as a whole, we submit that the court below correctly concluded that the affidavits

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sibility that evidence would be destroyed was presented by the affiant to show the inadequacy of conventional investigative techniques in order to obtain a court authorization as required by law, rather than as in *Likas*, to justify a departure from the law.

established the need for electronic surveillance in this particular case (Pet. App. A, p. 4):

> [I]n this case, agents had engaged in investigation for over three months, including physical surveillance of the suspects, had reasonably established that their informants would not testify, and had reason to believe that the other evidence thus far produced would not support a conviction. Further, physical surveillance of the residence identified by informants as housing the four "front office" telephones disclosed that it was fronted by a 5-foot high chain link fence topped by 3-stranded barb wire and had two large dogs patrolling the area between house and fence. Thus the government demonstrated a factual basis for its concern that the suspects might have time and inclination to destroy evidence in case of search.

For the foregoing reasons, we submit that the decision below is correct and in accord with the substantial weight of authority. It may, however, be inconsistent with the subsequent Ninth Circuit decision in *United States* v. *Kalustian*, No. 74-3314, decided August 4, 1975. The panel in *Kalustian* suppressed evidence derived from a court authorized wire interception on the grounds that the supporting application and affidavit failed to satisfy 18 U.S.C. 2518(1)(c). It enunciated the following standard to be applied in assessing compliance with that statute (slip op. 6):

> The Government must (1) inform [the issuing authority] of every technique which is customarily used in police work investigating the type of crime involved, and (2) explain

why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of the particular circumstances of that case.

The court in *Kalustian* apparently rejected the affiant's assertion of the need for the electronic surveillance based on his knowledge and experience in similar gambling cases as being "mere conclusions" (*ibid.*) which were insufficient to satisfy the requirements of Section 2518(1)(c).[7] It may well be that the *Kalustian* panel would have found the affidavits involved here inadequate.

We intend to petition for rehearing *en banc* in *Kalustian*, since we believe it was wrongly decided. It appears to impose substantially more stringent requirements for the showing under Section 2518(1)(c) than have previously been required by any of the courts that have interpreted that provision (see note 4, *supra*), including other panels of the Ninth Circuit. Neither in this case, nor in two prior decisions of that court, have requirements as stringent as those adopted in *Kalustian* been imposed.[8] We are aware of two other cases presently pending before the Ninth Circuit involving this same issue.[9] In view of these

[7] The court did not elaborate on its requirement that the issuing judge must be advised of "every technique customarily used" in investigating gambling offenses, and it is impossible to ascertain whether it believed that the affidavit before it was also insufficient in that regard.

[8] See *United States* v. *Smith*, *supra*; *United States* v. *Turner*, *supra*. The court in *Kalustian* made no mention of any of the circuit's prior cases involving the interpretation of Section 2518(1)(c).

[9] *United States* v. *Pezzino*, No. 75-2305; *United States* v. *Pulliam*, No. 75-1382.

cases, and of our intent to petition for rehearing *en banc* in *Kalustian,* there is a reasonable likelihood that the Ninth Circuit will further clarify its position on the interpretation of Section 2518(1)(c). Because of these considerations, and since the decision in the instant case does not conflict with that of any other circuit, we suggest that this issue is not now ripe for review by this Court in light of the fact that the Ninth Circuit has not yet had an opportunity to decide whether *Kalustian* accurately represents its views on the subject.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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